No. 15,994

United States Court of Appeals

For the Ninth Circuit

CHARLES CROWTHER and
IVY L. CROWTHER,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

RESPONDENT IS IN ERROR IN CONTENDING THAT APPELLANT'S JOB SITES ARE NOT TEMPORARY.

Respondent concedes that a taxpayer who travels between his residence and a temporary job site outside the city, or equivalent general area in which said residence is located, may deduct the cost of such travel, and in that regard respondent states at page 10 of his brief:

> "Similarly, while an exception to the general rule has been recognized in certain cases where a taxpayer travels between his residence and a temporary job site, the exception has no application here. The taxpayer in this case was not working at temporary job sites, but was engaged in log-

> ging activities at his usual post of duty or place of employment."

The respondent, at pages 19-20 of his brief, cites with approval a decision of the Tax Court which stated that it

> "recognized an exception to the general rule that a taxpayer's principal post of duty is his tax 'home' which is to the effect that when that post of duty is temporary his family residence may be his tax 'home' and travel expenses to and from his temporary post may be deductible."

Thus, respondent admits appellant's residence would be his tax home and that his transportation expenses between his residence and job sites would be deductible if the job sites were temporary, but contends that appellant's job sites were not temporary and therefore urges this Court to deny appellant's appeal on that ground. Let us examine the authorities presented by appellants and respondent relative to the issue of temporary employment versus indefinite employment.

In appellants' opening brief (Table of Authorities Cited, p. ii), we cited *Schurer v. Commissioner,* 3 T.C. 544, *Leach v. Commissioner,* 12 T.C. 20, *Frazier v. Commissioner,* 12 T.C.M. 1129, *Denning v. Commissioner,* 14 T.C.M. 838, and *Stegner v. Commissioner,* 14 T.C.M. 1081, and now cite *Kuris v. Commissioner,* Par. 56,163 P-H Memo. T.C., and *Selby v. Commissioner,* 14 T.C.M. 17, on the issue of temporary employment.

In *Schurer,* supra, a plumber took a job to assist in the construction of an ammonia plant, and his job lasted thirty-three weeks. The job was held to be temporary.

In *Leach,* supra, a construction worker was employed to work at various job sites for short periods ranging from a few weeks to several months, and the job sites were held to be temporary.

In *Frazier,* supra, an oil pipe paint machine operator was employed by one company at two different job sites, one assignment lasting eight weeks and the other twenty-three weeks, and both sites were held to be temporary.

In *Denning,* supra, a steamfitter was employed by one company for three months at one site and five months at another site, and was employed by another company for two months at a third site, and his job sites were held to be temporary.

In *Stegner,* supra, a plumber's job sites were all held to be temporary although one assignment lasted for fifty-five weeks, the Court saying at page 1082:

> "The work at New Brunswick lasted some longer, but the employment there was clearly of a temporary nature."

In *Kuris,* supra, a plumber's assignment was held to be temporary although it lasted one year.

In *Selby,* supra, an accountant was employed to install and supervise an accounting system for a construction company, and his employment for the seven months required to perform the work was held to be temporary.

In each of the above cited cases the taxpayer sought to deduct traveling expenses, and the Commissioner unsuccessfully resisted the deduction on the ground the employment was of indefinite duration.

Certain principles can be drawn from these decisions, as follows:

1. The taxpayer followed a trade or profession in which assignments of short duration were common;

2. The taxpayer was not regularly engaged at any single location;

3. The taxpayer accepted employment or job assignments for various periods, none of which periods, in general, exceeded one year;[1]

4. The employment at the job site terminated because there was no further work available at the site for the taxpayer, and not because he quit or was dismissed for improperly performing his duties.

Let us apply these principles to the facts of this appeal.

Appellant testified that falling and bucking is a temporary and seasonal job; that men engaged in the business often must take three, four, or five jobs in a single year (R. 140). The faller and bucker is assigned a layout to cut, and when it is cut over, he must move

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[1]In the Commissioner's Letter Ruling of May 4, 1956 (Par. 76,519—1956 Prentice-Hall Federal Taxes), the Commissioner stated:

> "While the Service has not attempted to prescribe any specific period as representing a temporary period, employment of anticipated or actual duration of a year or more at a particular location would strongly tend to indicate 'indefinite' employment there."

to another layout (R. 163). During 1951, appellant had one employer for eleven months, but was assigned three different job sites (R. 164). His 1951 job terminated because of the annual suspension of logging operations and not because he quit or was dismissed for unsatisfactory performance (R. 164). Appellant's first 1954 employment lasted only seven months and involved two job sites (R. 166). The employment terminated because the employer completed its logging contract (Par. 165-166). His second 1954 employment lasted five months and involved two job sites (R. 166). The entire crew was released at the end of the year, which again was the time for the annual suspension of logging operations (R. 78; R. 164).

Respondent informs this Court that appellant's job sites are not temporary and then cites decisions which respondent contends present principles and facts similar to the appellant's case. Let us consider respondent's authorities.

Respondent relies mainly upon *Commissioner v. Flowers,* 326 U.S. 465, and *Peurifoy v. Commissioner,* 358 U.S. 59. In *Flowers,* supra, there was no issue presented as to temporary or indefinite employment, and the Supreme Court held that a distant commute expense is not deductible where occasioned by the personal convenience of the taxpayer. In *Peurifoy,* supra, the Supreme Court sustained the decision of the Court of Appeals that the employment was not temporary. The Court of Appeals opinion, 254 F. (2d) 483, provided at page 487 thereof:

> "It is clear that two of them left that employment for personal reasons when work was still available, while the third left after 20½ months for an undisclosed reason. For aught that appears, work might have been available there for all three for much longer than 20½ months."

Thus *Peurifoy* establishes that if an employee quits a permanent or indefinite job within a relatively short period, the fact of quitting does not convert the job into a temporary job for federal income tax purposes. The facts of this decision are not in point in this appeal.

Respondent also cited, to support its contention that appellant's job sites were not temporary, *Ford v. Commissioner,* Par. 54,314 P-H T.C. Memo. Dec., in which a plumber's three-year job assignment was held not to be temporary; *Albert v. Commissioner,* 13 T.C. 129, in which a taxpayer's wartime employment and assignment by the War Department lasted two years and three months and was held not to be temporary; and *Claunch v. Commissioner,* 29 T.C. 1047, in which a taxpayer was employed to install three large boilers and the assignment lasted two years and was held not to be temporary.[2] These decisions, in-

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[2]It should be noted that Claunch was employed on two other jobs, performing the same type of work, before securing the two-year assignment, which two jobs lasted three weeks and three months respectively, and the Commissioner agreed these were temporary jobs. Obviously it was the length of the assignment that was the decisive factor.

It should be further noted that despite the two-year duration of the assignment in issue, five members of the Tax Court dissented, urging the assignment was temporary and, in any case, the exigencies of the business necessitated the travel expense.

volving employment of indefinite duration which lasts for two or three years, are not in point.

We submit that the facts before this Court present an overwhelming demonstration of temporary job assignments and temporary employment.

II.

RESPONDENT IS IN ERROR IN CONTENDING THAT APPELLANT'S AUTOMOBILE EXPENSES IN ISSUE ARE NOT DEDUCTIBLE.

In the event this Court determines that appellant's job sites are temporary, as we respectfully believe it must, then the Court must conclude that appellant's transportation costs between his home and layouts are deductible under the facts of this appeal and the applicable law. We submit, however, that regardless of whether or not the job sites are temporary, appellant would still be entitled to deduct the transportation costs in issue. In appellants' opening brief (pp. 16-18) we cited *Emmert v. United States* and *Jasper v. United States* (1955), 146 F. Supp. 322, for the legal principle that a taxpayer could deduct the transportation costs between his residence and his place of business where two factors were present:

1. The taxpayer traveled a sufficient distance each day so as to be away from home, that is, outside the general area in which his "tax home" was located. (A distance of thirty miles was involved in the *Emmert* decision.)

2. Business necessity, and not personal convenience, necessity or desire, require that the daily travel expense be incurred.

Emmert was serving a six-year term as a judge of the Supreme Court of Indiana and thus did not have a temporary position, as "temporary" is defined by the tax decisions. The respondent admits the validity of the decision, which permitted Emmert to deduct his daily transportation costs, but urges that this decision is not applicable to the instant appeal because the travel was caused by the state law that the taxpayer live in one place and work in another place. We reassert our position that it was the fact that business necessity, and not personal convenience, desire or necessity, required the travel, that is the basis for the decision. The contention of respondent that the decision turns on the cause of the necessity, to wit, a state law, rather than the necessity itself, is not logical. Emmert, as did the other Supreme Court justices in his state, incurred daily traveling expenses because a condition existed whereby they could not live within reasonable proximity of their work. Emmert was allowed to deduct his daily traveling expenses. Crowther, as did the other buckers and fallers, incurred daily traveling expenses because a condition existed (that condition being the nature of their work) whereby they could not live within reasonable proximity of their work. Crowther, as well as Emmert, is entitled to deduct his daily transportation expenses. The faller and bucker and the judge did not incur daily transportation expenses because of per-

sonal choice, convenience, or necessity, but because the nature of their respective trade and profession required such expenses.

Respondent urges further that almost everyone finds it impossible to live close to their work, so that appellant's problem is not different from that of other taxpayers. Actually, every taxpayer can live in the city in which he works or can live and work within a reasonably confined area equivalent to a city. This is the basis of the general rule that the cost of going to and from work is not deductible (Appellants' Opening Brief, pp. 21-22). The fact that a taxpayer chooses to live in the suburbs, or in a different city from that in which he works, is no basis for a tax deduction for travel between his residence and his place of business.

Appellant was required each day to travel the distance herein involved because of the nature of his business. Respondent contends this was a personal necessity and not a business necessity and states that personal necessity does not control allowance of business deductions, citing *Commissioner v. Moran,* 236 F. (2d) 595 (C.A. 8th), *Commissioner v. Doak,* 234 F. (2d) 704 (C.A. 4th), and *United States v. Woodall,* 255 F. (2d) 370 (C.A. 10th). Respondent is correct that business necessity and not personal necessity controls, but this appeal presents a case of business necessity. He cites *Commissioner v. Moran,* supra, and *Commissioner v. Doak,* supra, which both involved appeals wherein a husband and wife claimed food and lodging costs they personally incurred at

the hotel they owned and managed. As the Court of Appeals stated at page 708 in the *Doak* decision:

> "The expenses incurred by these taxpayers are expenses which everyone must incur to live, regardless of business requirements, and are, we think, personal and thus not deductible."

In *United States v. Woodall,* supra, the taxpayer incurred expenses in moving himself and his family from Dallas, Texas, to Albuquerque, New Mexico, where he had accepted employment, and was denied the right to deduct said expenses. Such an expense is clearly not a business expense, but is similar to an expense in obtaining employment, which is not involved in this appeal. Thus, respondent's cited authorities are irrelevant. Lodging and food costs are not generally deductible because they represent expenses incurred in order to live and are therefore personal necessity expenses and not business expenses. Personal necessity exists when it is incurred by all people generally, regardless of occupation. (*Smith v. Commissioner,* 40 B.T.A. 1038, affirmed 113 F. (2d) 114 (C.A. 2d). Travel expenses are business necessities and are deductible when required by the nature of the business, and travel expenses include transportation expenses, lodging, food and incidental expenses.[3] Appellant's automobile expenses, here in

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[3] *Emmert v. United States* and *Jasper v. United States,* supra;
Frazier v. Commissioner, supra;
Leach v. Commissioner, supra;
Denning v. Commissioner, supra;
Schurer v. Commissioner, supra;
Stegner v. Commissioner, supra;

issue, were incurred by all the members of his trade in Mendocino County and were caused by the nature of his trade, and are therefore deductible business expenses.

III.

THE RULE OF HELVERING v. TAYLOR IS APPLICABLE TO THIS APPEAL, AND RESPONDENT'S NOTICE OF DEFICIENCY FOR 1951 WAS THEREFORE UNLAWFUL.

In appellants' opening brief, we cited *Helvering v. Taylor,* 293 U.S. 507, 55 S. Ct. 287, for the rule enunciated by the Supreme Court, set forth at p. 290, as follows:

> "We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or if liable at all, shows the correct amount."

We informed this Court in our brief (p. 33) that the *Helvering v. Taylor* decision was generally applied in cases involving arbitrary determinations of gross income, but we submitted to this Court, and now resubmit to this Court, our contention that an arbitrary determination of deductions or of gross income results in an arbitrary taxable income and the rationale of the Supreme Court decision must apply to deductions

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Kuris v. Commissioner, supra;
Selby v. Commissioner, supra;
Revenue Ruling 190, 1953-2 C.B. 303.

denied in an arbitrary or irrational basis as well as gross income determined in such a manner.

Respondent denies the applicability of *Helvering v. Taylor*, supra, to this appeal and cites *Zeddies v. Commissioner,* 3 A.F.T.R. (2d) 724 (1959) (7th C.A.) to support his position. In that decision the Internal Revenue Service conducted an audit of the taxpayer's affairs and arrived at a proposed deficiency. The taxpayer, before the Tax Court, established that certain determinations made by the Commissioner were excessive, and the Tax Court reduced the excessive determination based upon the evidence. The taxpayer contended that he was entitled to have the entire deficiency eliminated under the *Helvering v. Taylor* rule, but the Court rejected this contention and said at p. 728:

> "We reject taxpayer's contention that he has established that the Commissioner's determination of deficiencies in his taxes were arbitrary and excessive or based on a formula which could not produce the correct amount of the tax due so as to bring this case within the rule laid down in Helvering v. Taylor, 293 U.S. 507."

In the *Zeddies* appeal, the taxpayer had obviously not established an *arbitrary* and *excessive* determination, but only an *excessive* determination. The Tax Court will often reduce the Commissioner's determinations, and this fact alone cannot possibly invalidate the entire determination.

In the instant case, the proposed 1951 deficiency was admittedly excessive, and in our opening brief

(pp. 33-35) we cited all the factors demonstrating arbitrary action and assessment. We submit that we have established the assessment therefore as both arbitrary and excessive and therefore void.

Respondent urges that all the harm done by his arbitrary action was overcome by the fact that the "Tax Court placed no reliance on the presumptive correctness of the Commissioner's determination, but redetermined from the facts presented to it the amount of income tax owed by this taxpayer." However, this is the Tax Court's duty in every tax case[4] and therefore is no ground in this appeal for ignoring the law established by the *Helvering v. Taylor* decision.

The respondent's brief cites decisions establishing that the Commissioner's motives, policies and procedures are outside the Tax Court's jurisdiction, and this is a correct general statement of law. However, in exercising its jurisdiction to redetermine deficiencies, the Supreme Court has determined that the Tax Court cannot sustain a deficiency determination which is both arbitrary and excessive. In this case, the Tax Court has erred by sustaining such an arbitrary and excessive determination.

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[4]After evidence is introduced by the taxpayer, the Commissioner's determination ceases to exist and the issue depends wholly upon the evidence.

San Joaquin Brick Co. v. Commissioner of Internal Revenue (1942), 130 F. (2d) 220, 9th C.A.;

Hemphill Schools v. Commissioner of Internal Revenue (1943), 137 F. (2d) 961, 9th C.A.;

Lawrence v. Commissioner of Internal Revenue (1944), 143 F. (2d) 456.

CONCLUSION.

We respectfully urge this Honorable Court that appellants are entitled to the modifications of the decisions of the Tax Court of the United States for 1951 and 1954, prayed for in the conclusion to appellants' opening brief (p. 36).

Dated, San Francisco, California,
May 11, 1959.

Respectfully submitted,
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